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Before the  
Federal Communications Commission  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
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In the Matter of )  
)  
Amendment of Section 73.202(b) ) MM Docket No. 98-155  
Table of Allotments, ) RM-9082  
FM Broadcast Stations ) RM-9133  
(Alva, Mooreland, Tishomingo, Tuttle, and )  
Woodward, Oklahoma) )

To: The Commission

**REPLY TO OPPOSITION TO APPLICATION FOR REVIEW**

Ralph Tyler ("Tyler"), by his attorneys, respectfully replies to the "Opposition to Application for Review" filed June 15, 2001, by Chisholm Trail Broadcasting Co., Inc. ("Chisholm Trail").<sup>1</sup> Tyler sought full Commission review of the action of the Chief, Allocations Branch, made under delegated authority in the Report and Order, *Alva, Mooreland, Tishomingo, Tuttle and Woodward, Oklahoma*, DA 00-2885, released December 22, 2000, 65 Fed. Reg. 82296, published December 28, 2000 (herein "*R&O*"), *recon. denied* Memorandum Opinion and Order, released April 13, 2001, 66 Fed. Reg. 21681, published May 1, 2001 (herein "*MO&O*"). As Chisholm Trail's Opposition was served by mail on June 15, 2001, Tyler has until June 28 within which to respond so this Reply is timely filed.<sup>2</sup>

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<sup>1</sup> Chisholm Trail on June 19, 2001, filed an Erratum.

<sup>2</sup> Pursuant to Section 1.115(d) of the Rules, replies are due within 10 days of the date the opposition is filed. Pursuant to Section 1.4(h) of the Rules, an additional 3 days will be allowed to all parties for filing a response where the document is served by mail.

## **The Allocations Branch Has Improperly Denied Tuttle, Oklahoma, a First Local Service**

In 1998 Tyler started this proceeding. His goal was to relocate his radio station, KTSH, Tishomingo, Oklahoma, to Tuttle, Oklahoma. That action would bring a first local service to the residents of Tuttle, a community of significant size (1990 population: 2,807). In the *Notice of Proposed Rule Making and Orders to Show Cause*, 13 FCC Rcd 25352 (1998) at paragraph 5, the Allocations Branch noted that, in addition to bringing a first local service to Tuttle, KTSH would also increase its service from 36,124 persons to 767,353 persons “for a net gain of 731,219 persons.” In his Comments, filed October 19, 1998 (¶ 8), Tyler reiterated that he had submitted letters of support from Tuttle community leaders, including the Tuttle City Manager, the Mayor, the Chief of Police, the president of the Tuttle Area Chamber of Commerce, and other local residents. Clearly, there are strong public interest benefits to reallocating Channel 259C3 to Tuttle.

The Allocations Branch denied Tyler’s proposal for one reason, and one reason only:

“...the Report and Order denied the Ralph Tyler proposal to reallocate Channel 259C3 from Tishomingo to Tuttle and modify his Station KTSH license to specify Tuttle as the community of license. **The reason for that denial was that the sole remaining local service in Tishomingo, noncommercial educational Station KAZC, does not provide any portion of Tishomingo with the principal city 70 dBu signal and provides only 23% of the Station KTSH service area with a primary 60 dBu signal. As such, we concluded that Station KAZC was not an adequate replacement service and that we would, in effect, be removing the sole local service from Tishomingo.** [emphasis supplied]”

The Allocations Branch went on to state that “It is our view that the pending Station KAZC application is comparable to [a] vacant allotment and unbuilt construction permit...and does not cure [the] disruption in service.” Assuming *arguendo* that the

Allocations Branch were right on the law, it has been impossible for Tyler to meet the Branch's newly announced standard because of the staff's failure to act on an application that has been pending since January 26, 2001 (File No. BMPED-20010126ABC) that would have fully resolved the Allocation Branch's concerns. KAZC would, but for the delay in acting on that application, be providing a service replicating 100% of the signal of KTSH, and the Commission could reallocate KTSH for operation at Tuttle. That delay was caused by Chisholm Trail Broadcasting Co., Inc. ("Chisholm Trail"), which has inundated the Commission with pleadings, objecting to KAZC's applications. In reviewing the action taken under delegated authority, this will be the full Commission's first opportunity to rectify this unfair situation so that Tyler can provide a first local service to Tuttle.

Section 307(b) of the Act<sup>3</sup> mandates the distribution of licenses "among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." This mandate was carried out in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982) which established priorities for determining the provision of first local service, and noted (footnote 4) that provision of first local service was among the objectives which the Commission has used over the years to govern AM Section 307(b) choices. Yet, in its *MO&O*, the Allocations Branch has set this bedrock principal on its head, ignoring the public interest in bringing a new service to Tuttle. Moreover, the delay in processing two applications that would resolve the Allocation Branch's concerns has resulted in a standard that Tyler cannot meet. As

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<sup>3</sup> 47 U.S.C. § 307(b).

set forth in Tyler's Application for Review, the full Commission should review the action of the Allocations Branch and reverse it.

Tyler has shown in his Application for Review the reasons why the Allocations Branch decision is erroneous and must be reversed. Much of Chisholm Trail's Opposition, however, is devoted to a misplaced attempt to raise in this proceeding matters that are outside the scope of the *MO&O* on review and Tyler's Application for Review. On page 4 and again beginning on page 13 and continuing through the end of its Opposition, Chisholm Trail attempts to raise what Chisholm Trail believes are infirmities in KAZC's long-pending application for license (filed in October, 1998) and KAZC's application for modification of facilities. These matters were raised *ad nauseum* before the Allocations Branch, and the Commission refused to consider them in this proceeding. If Chisholm Trail wanted to ventilate these matters, it should have filed its own application for review. Since neither the Allocations Branch nor Tyler have raised these extraneous matters, Chisholm Trail should not be permitted to raise them in the context of an opposition to an application for review.

Turning to the substantive matters in its Opposition, Chisholm Trail attempts to show that the cases cited by Tyler are inapposite for various hypertechnical reasons. However, Chisholm Trail is silent with regard to Tyler's core argument that although the Allocations Branch appears to have concluded that for purposes of a Section 307 (b) comparison, KAZC does indeed constitute an existing local transmission service; i.e., it is authorized to serve Tishomingo, complies with all technical requirements and has an

obligation to serve Tishomingo,<sup>4</sup> the Allocations Branch nevertheless wrongly found that KAZC's service to Tishomingo is not comparable to the service currently provided by KTSH. Because KAZC does not provide a "commensurate level of technical service", the Allocations Branch concluded, "the removal of Station KTSH would be analogous to the removal of a sole local service."<sup>5</sup> From there the Allocations Branch's analysis continued as if the reallocation of KTSH would leave no remaining local service in Tishomingo. Tyler showed that the Allocations Branch apparently established a new policy in conflict with the Commission's established policy as set forth in *Change of Community R&O*<sup>6</sup> and *Change of Community MO&O*<sup>7</sup>. Tyler pointed out that the Allocations Branch failed to explain what it means by the phrase "commensurate level of technical service." One cannot know how much coverage a noncommercial educational FM station would have to provide before it could be considered to provide a "commensurate level of technical service." Is a city-grade signal adequate? Must the replacement station be the same class as the replaced station? No one can know with

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<sup>4</sup> Section 307(b) restricts the Commission's licensing power to States and "communities." Accordingly, since its creation, the Commission has obliged broadcasters to (1) designate a principal community to be served and (2) serve that community. In the case of KAZC, the construction permit states on its face that KAZC's "Station Location" is "OK – Tishomingo," which was the "Principal Community" specified in response to Question 2 on page 1 of KAZC's underlying FCC Form 340, Application for Non-Commercial Educational Construction Permit filed January 27, 1997.

<sup>5</sup> *MO&O* at para. 4.

<sup>6</sup> *Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989).

<sup>7</sup> *Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 5 FCC Rcd 7094 (1990).

certainty whether the station left behind must fully replicate the service being removed, and if not, what percentage must be replicated.

Chisholm Trail never responded to this central argument. Instead, Chisholm Trail attempted to distinguish the cases cited by Tyler and then continued its uncalled for attack on the character of Ralph Tyler and the principals of the licensee of KAZC. But the cases cited by Tyler are directly in point: they are examples of situations where the Commission has removed a service from a community and left in its place a lower power station or, in some cases, a daytime only broadcast service as a replacement. And the attack on Tyler's character has no place here, both because Chisholm Trail did not preserve the issue in any timely filed application for review of the staff's decision and, even more importantly, because its allegations - which Tyler has fully answered many times before<sup>8</sup> - are themselves entirely without merit.

#### **Chisholm Trail's Motive Is to Cause Delay and to Obstruct this Proceeding**

Why does Chisholm Trail so stridently attack Tyler's plan to bring a first local service to Tuttle? Because Chisholm Trail knows that if the Commission grants the pending application for license for KAZC and the pending application to modify the construction permit of KAZC so that its signal will completely replicate the signal of KTSH, there will be no remaining impediment to Tyler's proposal to bring a first local service to the residents of Tuttle, Oklahoma. After all, the Allocations Branch has clearly stated that the sole reason for denying Tyler's proposal is its finding that KAZC is not an "adequate" replacement service for KTSH, and KAZC has on file an application that will

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<sup>8</sup> In this Docket, those documents include Tyler's Motion to Accept Response and Response filed December 14, 1998; Reply filed January 7, 1999; and Opposition to Motion to Hold in Abeyance filed April 13, 1999.

fix that problem. Upon grant of that modification application and KAZC's increase in coverage area, the Allocation Branch's concerns will be resolved. Chisholm Trail, must then at all costs, frustrate and delay Commission action on that application. Instead, the staff's inability to promptly act on the application has allowed Chisholm Trail to accomplish its goal—KTSH is still licensed to Tishomingo and Tuttle is without a first local service.

Chisholm Trail has succeeded in delaying action on KAZC's license to cover its construction permit – a ministerial matter<sup>9</sup>. The Commission is under an obligation to issue a license to KAZC, but it has failed to do so for almost three years because of Chisholm Trail's efforts. When KAZC filed its above-referenced application to increase its power, Chisholm Trail objected to KAZC's proposal to offer improved service to the residents of Tishomingo. In other words, the infirmities Chisholm Trail perceives in Tyler's proposal are all the result of Chisholm Trail's obstructive and abusive conduct in this proceeding.

Typically, it takes less than three months for the FCC to act on an application for minor modification of an FM station or an application for license to cover.<sup>10</sup> Yet the

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<sup>9</sup> Section 319(c) of the Act is explicit: "Upon the completion of any station for the construction of which a construction permit is granted, and it being made to appear to the Commission that all the terms, conditions and obligations set forth in the application and permit have been fully met, and that no cause or circumstance arising or first coming to the knowledge of the Commission since the granting of the permit would, in the judgment of the Commission, make the operation of the station against the public interest, the Commission **shall issue a license to the lawful holder of said permit for the operation of the station** [emphasis supplied]."

<sup>10</sup> See Broadcast Actions Report No. 44972, released April 26, 2001 (chosen at random by counsel), where an application filed March 2, 2001 (BMPED-20010302ABQ) for Station WJOJ, Harrisville, MI, was granted on April 23, 2001, only 51 days. On the same public notice, an application for license to cover FM construction permit filed

FCC has delayed action on the KAZC application for license since it was filed on October 2, 1998. The KAZC modification application was filed on January 26, 2001, and is still pending five months later. This delay in acting on routine applications was caused by the enormous volume of specious pleadings with which Chisholm Trail deluged the FCC. The Commission listed the numerous pleadings filed by Chisholm Trail attempting to raise character issues against Tyler and disposed of them in a footnote: "A resolution of these issues in the context of this proceeding is not necessary prior to the resolution of this proceeding in light of our decision herein."<sup>11</sup>

The matters raised by Chisholm Trail are of the type that, if considered at all, should be addressed by the Enforcement Bureau, not the Allocations Branch. Put another way, none of the allegations raised by Chisholm Trail have any bearing whatsoever on the issue before the Commission; i.e., whether KAZC is an adequate replacement for KTSH. In fact, in the *MO&O* currently on review, there is no reference at all to Chisholm Trail except in the opening paragraph and in footnote 1 stating that despite Chisholm Trail's late filing its opposition to Tyler's petition, the Allocations Branch considered Chisholm Trail's opposition to Tyler's Petition for Reconsideration. Since none of the allegations raised by Chisholm Trail were addressed in the *MO&O*, they did not form a basis for the Allocation Branch's decision, and Tyler did not raise them on review, nor did Chisholm Trail file any timely application for review, raising these issues. As a result, there is nothing before the Commission for decision except the narrow questions posed in Tyler's Application for Review. And on that issue, the law

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January 26, 2001 (BLH-20010126AAH) for KRRR, Cheyenne, WY, was granted on April 23, 2001, a period of approximately three months.

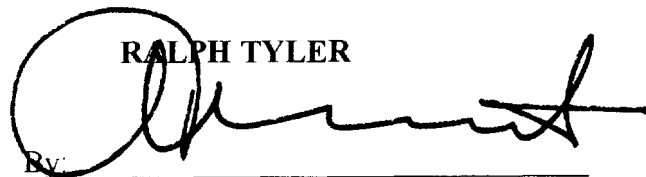


is clear: the public interest will be served by a modification of the license of Station KTSH, to move that station from Tishomingo, Oklahoma, to Tuttle, Oklahoma.

### **Conclusion**

Therefore, Tyler urges the Commission to reject the obstructive arguments made in Chisholm Trail's Opposition, to reverse the Allocations Branch's *MO&O*, and for the reasons set forth in Tyler's Application for Review, reverse the decision of the Allocations Branch and allot Channel 259C3 to Tuttle, Oklahoma, and modify the license of KTSH to operate on Channel 259C3 at Tuttle.

Respectfully submitted,

  
By: \_\_\_\_\_

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<sup>11</sup> *R&O*, footnote 1.

**CERTIFICATE OF SERVICE**

I, Angela Y. Powell, a paralegal in the law offices of Smithwick & Belendiuk, P.C., certify that on this 28th day of June, 2001, copies of the foregoing Reply to Opposition to Application for Review were mailed, postage prepaid, to the following:

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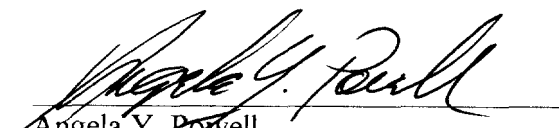
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